F.M.S. REPORTS

[APPELLATE CIVIL JURISDICTION]
THOMAS C.J., (F.M.S.,), HOWES Ag. C.J., (S.S.,)
CUSSEN J.
July 21, 1937.

KHOO BOO HOOI otherwise known as KHOO BENG HOOI.....Defendant Appellant.

vs.

ROBERT CECIL RUSSELL .....Plaintiff-Respondent.

AND ON THE COUNTERCLAIM.

KHOO BOO HOOI otherwise known as KHOO BENG HOOI.....Plaintiff-Appellant.

vs.

1. KHOO BOO BOON
2. KHOO BOO SIEW
3. KHOO BOO TEE
4. KHOO BOO HOCK
.....Defendants-Respondents.

[SELANGOR CIVIL APPEAL No. 1 of 1937]

Lunacy Enactment, 1898—inquiry—order adjudging person to be of unsound mind—alleged lunatic out of jurisdiction—order based on evidence taken on commission—validity.

In 1905 the Senior Magistrate, Kuala Lumpur, made an order in an administration suit whereby he found a testator to be of unsound mind and incapable of managing himself and his affairs. At that time the testator was an alien residing out of the jurisdiction of the Court. A commission of inquiry was held in Amoy as to his sanity, and reports as to his sanity were obtained from doctors in Amoy. The Court acted on those reports and made the order in question.

Held, that the order was made without jurisdiction and was inadmissible in evidence under the Evidence Enactment.

APPEAL.

Joaquim (*Charlesworth* with him) for the Appellant.

Ford for the Respondent.

Hastings & Wagner, for the Respondents on the counterclaim.

Cur. Ad. Vult.

THOMAS, C.J.—The first question to be considered in this appeal is the admissibility of an order made on the 12th of May 1905 in the Court of the Senior Magistrate at Kuala Lumpur in Administration Suit No. 143 of 1904. This ground of appeal does not appear in the grounds of appeal, but an application was made to amend the grounds of appeal by its insertion. There was no objection to the amendment being made, and the Court of Appeal ordered that the memorandum of appeal should be amended by the inclusion of this additional ground of appeal.

By the order first referred to the Court found that Khoo Chye Cheah to whom I will afterwards refer as the testator was a person of unsound mind and incapable of managing himself and his affairs.

The testator at that time was an alien residing out of the jurisdiction. In fact he resided in China, and a commission of enquiry was held in Amoy as to his sanity, and reports as to his sanity were obtained from doctors in Amoy. The Court acted upon those reports and made the order in question.

In 21 *Hailsham*, page 305, I find the following statement:—

> "But apparently there is no jurisdiction to order an inquisition in the case of an alien both domiciled and resident abroad although entitled to property in England."

A foot-note says:—

> "It is true that the *ratio decidendi* in *Re Bariatinski* (*Princess*), 1843, 1 Ph. 375, was the necessity of taking charge of the property of the person of unsound mind with regard to her residence at the time. None the less the Lords Justices have on several occasions expressed some doubt as to whether they had jurisdiction in such a case (see *Re Soltykoff* (*Princess*), 1898, W.N. 77 C.A."

In my opinion it is clear that the order of the 12th of May 1905 was made without jurisdiction. In the course of the argument it was urged that the order was not admissible under any section of the Evidence Enactment, and sections 41, 42 & 43 were especially referred to But it seems to me that even if the Order might have been put in evidence under one or other of those sections, there is still the objection to be met, viz. that the order was made without jurisdiction. And in *Taylor* on Evidence, 11th edition, vol. 2 page 1168, s. 1714 it is stated that every species of judgment will be rendered inadmissible in evidence by showing that the Court from which it emanated had no jurisdiction.

Section 44 of the Evidence Enactment provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 and 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion.

In my opinion it has been shown that the Court of the Senior Magistrate was not competent to deliver any order against a non-resident alien, and therefore I am satisfied that it was not competent to deliver the judgment or make the order. This is the only matter on which the plaintiff and the defendants to the counter-claim rested their case in the substance of the case pleaded in the reply.

At the trial it was sought to give additional evidence as to the testator's insanity, but this was excluded, and in my opinion was rightly excluded by the learned trial Judge.

There was, therefore, no evidence of the testator's insanity before the learned trial Judge. The defendant Khoo Boo Hooi (plaintiff in the counter-claim) called evidence which, though inadequate to meet a case of insanity found as a

result of an enquiry, was sufficient to prove testamentary capacity in an individual who must be considered primarily as sane. This was the only case which was submitted to the doctors who conducted the examination. They were not told anything about the enquiry, but were called in to give their opinion as to the testamentary capacity of the testator. Not knowing anything of the previous medical history of the testator, they treated him as an ordinary person, and came to the conclusion that he satisfied the tests as to testamentary capacity with regard to a sane person.

From that point of view I see no reason for discarding their evidence. In my opinion, it is sufficient in the absence of any other evidence to support the defendant's case. Therefore in my opinion the codicil should have been admitted.

The appeal must therefore be allowed. The decision of the Court below must be set aside. There must be a pronouncement in favour of the codicil or testamentary paper dated the 22nd of May 1928, and it must be admitted to probate along with the Will of the testator dated the 29th of October 1897.

In view of the order of the learned trial Judge that the costs of all parties to this suit viz. plaintiff, defendant and defendants to the counter-claim should be taxed as between solicitor and client and paid out of the estate of the testator. I consider that a similar order should be made with respect to this appeal and also that the order should stand with regard to the trial.

The sum lodged as security to be paid out to the appellant.

HOWES, J.—In this appeal, the fifth ground of appeal (which by leave of the Court was added in the course of the hearing on the 6th May 1937) appears to me the most important as a preliminary, viz.

> 5. The learned trial Judge was wrong in admitting the said order of Court made in 1905; and should have held that it was inadmissible or irrelevant or both.

The order in question (p. 20 in Bundle "C") bears the date 12th May 1905, but from the evidence of witness Karthigasu (p. 24 of Appeal Record) it appears that the order was in fact made on the 28th March 1905, and on p. 26 of the Record, the trial Judge held that "a finding or declaration dated 28th March 1905 has been proved and that C. 20 is the Court's order made on this finding." The date is of little, if any, importance.

Previously, Mr. Charlesworth (p. 24 of Record) asked it "to be recorded that nothing in Exhibit F (i.e. the bundle marked "C") is yet admitted as evidence in the case." In spite of this, the learned Judge found (as above stated) that the Court's order had been proved.

This was an order made under the then Lunacy Enactment 1898, by which the Court of the Senior Magistrate, Kuala Lumpur, found that "Khoo Kye Cheah is a person of unsound mind and incapable of managing himself and his affairs" and proceeded to appoint one Charles Henry Downer as Committee of the estate of Khoo Kye Cheah.

Subsequently, on the 27th September 1920 the partners and manager of the firm of J. A. Russell & Company, viz. John Archibald Russell, Donald Oscar Russell and Robert Cecil Russell (the Plaintiff-Respondent) and Herbert Henry Robinson (their Manager) were substituted as Committees of the Estate of Khoo Kye Cheah, and managed his affairs for 28 years, until the date of his death.

The question is—Was this order of 28th March 1905 properly admitted in evidence?

The admissibility of judgments, orders and decrees are governed by sections 40 to 44 of the Evidence Enactment (Cap. 10).

These amount to a codification of the English law on the subject of the admissibility of judgments *in rem* and judgments *in personam.*

In England, the result of an inquisition in lunacy would be admissible as a judgment *in rem.*

This point was considered by the Court of Appeal in the case of *Hill* v. *Clifford* (1907, 2 Ch. at p. 244) wherein Cozens-Hardy M. R. stated:—

> "It is by no means easy to find a satisfactory definition of a judgment *in rem.* In *Smith's* Leading Cases it is defined as 'an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject-matter by a tribunal having competent authority for that purpose.' There are however, two classes of judgments *in rem*, one of which is conclusive against all the world, and the other of which is not conclusive, though admissible in other proceedings. Instances of the former class are adjudications by a competent Court as to the existence of a marriage, or a condemnation of a prize in the Admiralty Court. A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive and may be traversed."

The learned Master of the Rolls said at p. 245, quoting from the case of *Van Grutten* v *Foxwell* (also a Court of Appeal judgment but not reported on this point, although the point is mentioned in the appeal to the House of Lords (1897) A.C. at p. 660):—

> "Lopes L. J. said 'The inquisition affords no doubt *prima facie*, but not conclusive, evidence of Mary's insanity in October 1833, anterior to the execution of

the disentailing deed, evidence which should be acted upon unless there is evidence the other way.' And Rigby L. J. said: 'The inquisition of 1848 is evidence that Mary was insane as from October 1833, though so far from being conclusive, it is not even strong evidence of her being insane at the date of the disentailing deed if a contrary case can be made out.' And they held that there was sufficient evidence to the contrary, and that the disentailing deed (made in 1835) was valid."

In neither the present F.M.S. Mental Disorders Enactment, nor in the Evidence Enactment, is there any provision corresponding to section 116(1) (e) of the Imperial Lunacy Act 1890, under which, in cases where property or income does not exceed a certain value, a certificate of a Master (in Lunacy) or the report by the Commissioners, or evidence by affidavit or otherwise is admissible but not conclusive evidence to prove to the satisfaction of the Judge in Lunacy, that a person is of unsound mind, and incapable of managing his affairs.

The difficulty is to bring the Order of the 28th March 1905 within one or other of sections 40 to 43 of the Evidence Enactment. Orders, other than those mentioned in these sections are irrelevant, unless the existence of such order is a fact in issue, or is relevant under some other provision of the Enactment.

Clearly, the order does not come within section 40, which only applies when there is a *lis penaens* or the matter is *res judicata*. Section 41 incorporates the English law on the subject of judgments *in rem*, and is limited to final judgments, orders or decrees of a competent Court in probate, matrimonial, admiralty or insolvency jurisdiction. Such judgments are conclusive, and are relevant not only between parties, but as against all the world, as they affect the status of the person or thing concerned.

Since this section is limited to the jurisdiction mentioned, an order in lunacy would not come within the section, and would not, of itself, be relevant.

Section 42 only renders certain judgments or orders relevant if they relate to matters of a public nature; consequently this section is inapplicable to the present case; and even if it were, such judgments or orders are not conclusive of that which they state.

Under section 43, judgments, orders and decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant, unless their existence is a fact in issue, or is relevant under some other provision of the Enactment. The illustration to section 43 indicates the types of judgment to which it refers; viz. where the *fact* of any particular judgment having been given, is a matter to be proved in the case, e.g., where the judgment would disclose a motive.

Even if it could be argued that the order in the present case was relevant "under some other provisions of this Enactment," as for instance, as a presumption under section 114, of the continuance of insanity till sanity is proved, it does not appear to me that it would be the best evidence, seeing that the order was made in 1905, and the material date (so far as the sanity of the testator was concerned) was the date of the codicil, namely, 22nd May 1928.

Since section 41 of the Evidence Enactment incorporates the English law as to judgments *in rem*, but does not include those which Cozens-Hardy M. R. in the case of *Hill* v. *Clifford* (*supra*), referred to as the second class of judgments *in rem*, which are not conclusive, though admissible in other proceedings, I am forced to the conclusion that the admission of the order of 28th March 1905, was wrong.

Reference has been made to the case of *Seshamma* v. *Padmanabha Rao* ((1917) I.L.R. 40 Mad. 660) in which it was held that the effect of an adjudication under the Indian Lunacy Act (XXXV of 1858) that a person is a lunatic, is to raise a presumption that he continued to be of unsound mind until the contrary is shown.

That was a case dealing with the adoption of a son; and it was held that unless it is proved that the lunatic was of sound mind at the time he is alleged to have made the adoption, the adoption is invalid.

It does not appear from that report whether objection was taken (as it was in the present case) to the admission of the order of adjudication under the Lunacy Act, or how that adjudication was proved. The Court appears to have followed the English decisions in which there has been an inquisition in lunacy, and in which stricter proof of the alleged lunacy is required than in the comparatively simple procedure laid down by the F.M.S. Lunacy Enactment, 1898, under which the order of the 28th March 1905 was made. Under that Enactment, the alleged lunatic could be personally examined by the Court, or by some person from whom the Court desired to have a report as to his mental capacity or condition. On the completion of the enquiry, the Court decided whether or not the person is of unsound mind, and if he were so adjudged, could appoint a committee of the estate of such person. The Enactment did not even require that the person reporting shall be a medical practitioner; though in practice he would always be one.

And yet the English Cases quoted in *Seshamma* v. *Padmanabha Rao*, to which I have already referred, go to show that an inquisition in lunacy, so far from being conclusive, is not even strong evidence of a person being insane at

some material later date, if a contrary case can be made out.

Even if I am wrong in my conclusion that the order of the 28th March 1905 was improperly admitted, and the trial Judge was right in admitting it, all this order did, was to shift the burden of proof on to the appellant.

As the result of that order, the presumption is not then (as it would otherwise be) in favour of sanity or soundness of mind, but the contrary must be proved; that is, the appellant who alleges the sanity of the testator at a time subsequent to that at which he has been proved to be of unsound mind (viz. 28th March 1905), has the burden cast on him of proving the soundness of mind of the testator.

It becomes necessary to consider the nature of the bequest, and the relationship between the testator and the beneficiary.

This was not a case of some specific property being devised to the appellant. All the testator did, by the codicil of the 23rd May 1928, was to include the appellant as a co-beneficiary to the residuary estate, with the testator's four other named sons.

It did not require any great testamentary capacity to make such a codicil; and yet the learned trial Judge, in his judgment (p. 106), dealt at length with cases such as *Banks* v. *Goodfellow* in which it was laid down that a testator " shall understand the extent of the property of which he is disposing."

The evidence of Chun Cheok Khuan (p. 42), chief Chinese clerk to Messrs. Presgrave & Matthews (the solicitors who prepared the codicil) and who accompanied Mr. De Buriatte, the partner, on the 27th March 1928 in order to converse with the testator, and say whether or not Chun Cheok Khuan considered him sane, is very clear. This witness, who spoke Hokkien, asked the testator how he wished his property to be divided, and he said he wished Khoo Boo Hooi (the appellant) to have a share equally with his sons.

Later, on the 21st May 1928, the witness went again with Mr. Bishop (a solicitor and assistant to Messrs. Presgrave & Matthews) and took the testator's instructions as to the preparation of the codicil. The witness stated (p. 44) that the testator " was insistent that his property should not be divided till after his death. After his death it was to be divided into five equal shares to his five surviving sons including Khoo Boo Hooi." As the result, the codicil was prepared and the witness translated it to the testator, who executed it in the presence of Doctors Gossip and McKern.

The testator at that date was about 77 years of age.

With regard to the relationship, there is no dispute that the appellant was the adopted son of the testator, and, to quote the judgment of the trial Judge as to costs (p. 109) "as such, in Chinese law and custom, would be entitled to some benefit from his adopted father's estate."

This is not a case of some stranger seeking to benefit under a will. It was perfectly natural that the testator should desire to provide for the appellant, and this is borne out by the evidence from different people who saw the testator, viz. Dr. McKern (p. 33), Chun Cheok Khuan (p. 43), Mr. Bishop (p. 20 of Depositions taken in London) and Dr. Gossip (p. 31 of Depositions), to all of whom he clearly expressed his intention of benefiting the appellant.

There is no evidence to rebut this intention, except the presumption of continuing insanity arising from the order of the 28th March 1905.

On the other hand, there is, in my view, overwhelming evidence to rebut the presumption of continued insanity, even if the latter was established by the above order, notwithstanding the conclusions of the trial Judge, who stated (p. 108) "The effect of the evidence on my mind is to lead me to the conclusion that the defendant" (appellant) "has not proved that the testator was of sufficiently testamentary capacity when he executed the codicil."

With regard to this conclusion; it was based (as regards two important witnesses) on the evidence taken on commission, viz. that of Mr. Bishop and Dr. Gossip, as to which this Court is in as good a position to assess its value as was the trial Judge.

In ground 2(1) of the Grounds of Appeal, it is submitted that the trial Judge misdirected himself in detaching weight from the evidence of Mr. Bishop and Chun Cheok Khuan on the ground that it was "perhaps not altogether disinterested" as one was the solicitor for the defendant and the other his solicitors' clerk.

Examination of that and other evidence, does not, in my opinion, justify that remark.

Messrs. Presgrave & Matthews are a firm of the highest standing in Penang, and Mr. de Buriatte's evidence (p. 50) shows the care with which he approached the matter of drawing the codicil, having learnt that the testator had been found a lunatic previously. It was on this account that he sent his clerk to interview the testator before taking any further steps. Mr. de Buriatte was then going on leave and he warned Mr. Bishop to be careful how he handled the matter, and said that certificates from two doctors that the testator was of sound mind must be obtained.

To suggest that Mr. Bishop was "not altogether disinterested," seems to me far-fetched. The only interest Messrs. Presgrave & Matthews could have was the small fee which, drawing a short codicil of this nature, would bring in.

Mr. Bishop (p. 19 of Depositions), after referring to his diary in which he had recorded that the appellant had said "He hoped the codicil would be drawn as much in his favour as possible," stated "It put me on my guard definitely, and I was more careful than ever to get instructions from Khoo Khye Cheah" (the testator). Earlier (p. 17) he had stated "I considered Khoo Boo Hooi as an agent, a conduit pipe, of Khoo Khye Cheah, and I treated Khoo Khye Cheah as my client. I had to be satisfied before I made a codicil that Khoo Khye Cheah was of sound testamentary capacity . . . . I am an officer of the Court first and foremost." And (at p. 28) in answer to the question, "If you had the slightest doubt about the instructions, would you have taken the responsibility of preparing the codicil?" Mr. Bishop said, "No, I would not."

It seems to me that Messrs. Presgrave & Matthews took every precaution possible in the circumstances, to guard against the validity of the codicil being questioned on the ground of incapacity of the testator.

On the question of the mental capacity of the testator to make a codicil, the evidence of Dr. Gossip (Deposition p. 29) is very strong. He examined the testator "because there was some doubt as to whether he was mentally capable of making a will."

Dr. Gossip's evidence is (p. 31) that the testator's wishes "were that the adopted son was to share, so far as I could make out, equally with the blood relation sons."

The learned trial Judge made much of the fact that neither Dr. Gossip nor Dr. McKern had, prior to the examination of the testator, been informed that a Court had declared the testator of unsound mind twenty-three years previously, and to their statements that had they known that fact, it would have made no difference to their examinaion or to their opinion. The Judge added, "one wonders whether they are right in thinking so."

Dr. Gossip (p. 35) in answer to the question whether, if he had known this, "would that have made any difference to the type of examination to which you would have subjected him?" very frankly said, "I could not say. I was absolutely satisfied that he was sane, but whether, if I had all that knowledge, I would have taken any further steps, I really cannot say now." . . . "I gave him a very thorough examination. I have had a lot of dealings with Chinese wills, and I had known what a lot of bother they seem to cause."

Dr. McKern's evidence, given before the trial Judge, was equally clear. He examined the testator on the 18th May 1928 "as to his fitness mentally to make a will or an alteration to his will." He had no details of the testator's mental history before he examined him. Dr. McKern stated (p. 33) that he asked the testator (inter alia) "if he wished to alter his will and he told me, yes. I asked him why he wished to alter his will, and the purpose was to admit his adopted son to an equal share with his four other surviving natural sons . . . He told me his adopted son had been very good to him. I was with him that day a good half hour. I was definitely of opinion that he was quite competent to make his will, and that it was his own wish that the alteration should be made. I would not have issued a certificate if I had had any doubt."

Dr. McKern, with Dr. Gossip, witnessed the codicil, after the solicitor's clerk had read it out in Chinese.

Dr. McKern continued:—"Dr. Gossip and I put questions to him (testator) again testing his memory and mental capacity and asking him the substance of the codicil. He stated that he wished his property to be divided equally amongst his five sons. I was satisfied beyond any doubt as to testator's competency on that date to make his will . . . Dr. Gossip expressed himself as similarly satisfied."

In cross-examination (p. 35), Dr. McKern said, "Had I known the testator had been certified insane, I would not have made any more thorough examination." . . . "I am satisfied that he was perfectly capable of making a will. A lunatic could not or may not be able to answer the questions in my certificate." And, at p. 41, "In course of practice for the last 17 years I have made many similar examinations. It is fairly common to examine a testator as to his mental state. There are always disputes over wills. I would never have given my certificate if I had not been thoroughly satisfied as to the testator's capacity."

In view of the evidence given by persons who had seen the testator, I am of opinion that the judgment of the learned trial Judge was so much against the weight of evidence as to be wrong.

Mr. Hastings, for the respondent, contended that the evidence fell short of that which is necessary to prove that the codicil was made by the testator during a lucid interval, and that if this Court is against him, that the proper course would be for this Court to order a retrial. He said there were two rulings by the trial Judge as to the evidence, one (at p. 58) viz.

> "I hold that the defendants to the counterclaim may not prove insanity *aliunde* i.e. apart from the fact of the order in lunacy made in 1905 and pleaded in the pleadings."

and a second ruling (at p. 78) on the statement of Mr. Wagner, then appearing for the defendants to the counterclaim, viz. "I want to call certain evidence. The evidence will prove how and why the codicil came to be executed and evidence throwing discredit on story of Khoo Boo Hooi (the appellant)," on which the learned trial Judge

stated: "I decide that no further evidence can be called in this case."

This second ruling was the subject of a Notice of Cross-Appeal (p. 113) filed on the 17th February 1937 by the defendant-respondents, but that Cross-Appeal was withdrawn by notice of the 21st April 1937, so that objection cannot now be gone into, and the only matter now before the Court is the judgment as it stands.

With regard to the first ruling, in the "Reply" (p. 7) under the heading "Substance of the Case" the order of the 28th March 1905 (declaring the testator to be of unsound mind) only was pleaded. The letter of Messrs. Ford & Delamore of the 11th July 1935 (Exhibit A p. 10) was a clear acknowledgment that Mr. Ford relied on the above order, and did not seek to prove the alleged lunacy by other evidence.

Mr. Joaquim, for the appellant, submits that the trial Judge was right in both these rulings, and that the defendant-respondents have not suffered any serious injury in not being allowed to call their evidence, even if they were entitled to do so.

It was open to the defendant-respondents to prove the testator's lunacy in 1928. They did not do so, but relied upon the order of the 28th March 1905.

It seems to me that, whichever view one takes of this case, the appellant is entitled to succeed.

If, as I hold, the order of the 28th March 1905 was inadmissible, there was no evidence before the Court to rebut the presumption of sanity. In these circumstances, the onus was on the respondents to prove that the testator was insane at the time he executed the codicil. This they failed to do or attempt to do, as they relied entirely on the above order.

On the other hand, had it been proved by other evidence that the testator was a person of unsound mind, in my view, having regard to the nature of the codicil and the precautions which were taken prior to its execution, there was ample evidence to hold that the testator executed it during a lucid interval, when he was of sufficient testamentary capacity to make a disposition of his estate with understanding and reason.

In my opinion this appeal should be allowed and the first codicil dated the 22nd May 1928 be pronounced for in solemn form along with the will of the testator dated the 29th October 1897, as together with it, constituting the true last will of Khoo Khye Cheah deceased. The costs of this appeal and in the Court below of all parties to be taxed as between solicitor and client and paid out of the estate. The deposit should be paid out to the appellant or his solicitor.

There is one other matter, which, though not forming part of this appeal, was brought to our notice, and that is, the execution of a document purporting to be a further will of the testator alleged to be dated 24th May 1928, by which the defendant-respondents were appointed executors and trustees and also residuary legatees. The alleged will is the subject of Probate Suit 3 of 1935, but Mr. Wagner, solicitor for the alleged executors, on 4th July 1935, wrote to Messrs. Pooley & Co., the present appellant's solicitors, informing them that his clients do not propose to propound that document as a will.

Before us, Mr. Wagner on behalf of these executors and beneficiaries under that alleged will, stated he had no objection to that will being ignored.

Since all the parties interested are before this Court, the suggestion made by Messrs. Pooley & Co. in their letter of 5th July 1935 (p. 17 of "Papers re Will alleged to have been executed on 24th May 1928") that there should be a formal order made in Probate Suit No. 3 of 1935 condemning the paper writing bearing date the 24th May 1928 as a void and invalid testamentary instrument seems to me the best solution of the difficulty, rather than simply ignoring the existence of that document.

CUSSEN, J.—One important question of law is raised in the grounds of Appear in this case. It is set out as follows in the Memorandum of Appeal:—"The learned Trial Judge was wrong in admitting the said Order of Court made in 1905 and should have held that it was inadmissible or irrelevant or both."

The Court of the Senior Magistrate at Kuala Lumpur, Selangor, which then had jurisdiction in Lunacy, under the "Lunacy Enactment 1898" (a State Enactment) on 28th March 1905 found the Testator to be of unsound mind and incapable of managing himself and his affairs and appointed a Committee of his estate.

The Respondents in this appeal relied upon this Order of Court to establish that the Testator was of unsound mind in 1905.

Now in England it is the law that an Order in Lunacy is admissible as *prima facie* evidence of the fact of the unsoundness of mind or insanity so found, of its existence at the date of the Order.

That has been decided in the cases:—

Harvey v. *Rex*, (1901) A.C. 601
Hill v. *Clifford*, (1907) 2 Ch. 236
Van Grutten v. *Foxwell*, (1897) A.C. 658.

But here admissibility depends upon the provisions of the Evidence Enactment.

Both at the trial and in this Court the only provisions of the Enactment to which attention was directed are sections 40—44; and the case for admissibility was based on Section 43 on the

ground that the existence of the Order was a fact in issue. But that is not correct; it is not the existence of the Order which is in issue but the truth of its contents. But under section 43 the Order is admissible if relevant under "some other provisions of this Enactment." And the "other provision" in this case is section 82 which reads:—

> "When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England or Northern Ireland would be admissible in proof of any particular in any Court of Justice in England or Northern Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed—
>
> (a) the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held at the time when he signed it the judicial or official character which he claims;
>
> (b) the document shall be admissible for the same purpose for which it would be admissible in England or Northern Ireland."

This is the same as Section 82 of the Indian Evidence Act, and in the commentary by *Woodroffe & Ameer Ali* on that Act a list of documents coming under that section is given which includes Orders in Lunacy (9th edition, page 589).

The order is admissible for the same purpose for which it would be admissible in England, i.e. to establish *prima facie* the fact of unsoundness of mind at the date of the Order.

At the trial another objection in Law was taken to this order—that it was made without Jurisdiction and so was a nullity. It was argued that as the Testator was an alien and not resident within the State of Selangor there was no jurisdiction to make the Order. It was clearly open to the Appellant to make this objection at the trial although not set out in his pleadings—it is a point of Law—provided the necessary facts are either admitted or proved in evidence, which is the case here. The testator was born in China, came to Malaya and acquired property in—among other places—the State of Selangor, and probably—although I cannot find it explicitly stated—resided for some time in Selangor. But he was married in Penang, and was living there in 1902 when he went to China. He also had his "family house" in Penang. He returned from China to Penang in 1916 and lived there in his "family house" until his death in 1935. So that from at any rate 1902 he never resided within the jurisdiction. He had, however, property within the jurisdiction.

Now in English Law the position in such a case appears to be that there is no jurisdiction to order an inquisition in the case of an alien both domiciled and resident abroad although entitled to property in England; but this does not prevent the appointment of a receiver of the income (*Halsbury*) (*Hailsham*) Vol. XXI page 305 and the foot-note (f)), and on page 304, paragraph 523, it is stated:—

> "Proceedings in lunacy can be originated in one of two ways, either by petition for an inquisition or by formal application for the appointment of a person to exercise the powers of a committee of the estate hereinafter referred to as a "receiver of the income." In the former case the patient being found by inquisition to be of unsound mind the custody of both his estate and person are under the jurisdiction of the judge in lunacy. In the latter case the lunacy jurisdiction only extends to the patient's estate."

But in this case also the Order contains a judicial finding that the person is a lunatic or of unsound mind and, therefore, being an order in Lunacy, is, on the authorities referred to above, admissible as *prima facie* evidence of the facts stated therein.

In my opinion, therefore, both these objections in Law to the Order in question fail.

In his judgment, as I read it, the learned Trial Judge makes no finding upon either of these questions of law. He says "Now quite apart from any questions of whether or not the Court in 1905 acted without jurisdiction or of whether or not the Court's order of 1905 is or is not conclusive proof of that which it states" (it could not of course be conclusive proof, nor was any such contention put forward) "it seems clear to me, and so I hold, that this finding of fact places on the defendant a distinct burden to prove, if he wished to establish the Codicil, that in 1928 the Order in Lunacy of 1905 had been revoked or that the testator has exercised his testamentary capacity in a lucid interval. As the former was impossible the case really turns on the evidence as to the latter."

Now in English Law the Order in Lunacy, not being revoked, raises a rebuttable presumption that at any time subsequent thereto the unsoundness of mind is still existent.

Under the Evidence Enactment this presumption can arise only under section 114 which reads:—

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their

relation to the facts of the particular case."

And in the commentary on the Indian Act referred to before, the presumption of continuing insanity is brought under illustration (d) to the section, i.e. "that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence" (*Ameer Ali*, 9th edition p. 807).

In this respect Section 56 and section 57(1) (ix), (2), (3) of the Evidence Enactment are relevant.

In this particular case one of the difficulties arising on the question of fact which is all that now remains to be considered is the absence of any knowledge, or at any rate any direct knowledge, of the nature of the unsoundness of mind from which the Testator suffered in 1905.

We do know it is not a case of delusions, which appears to rule out both "Mania" and "monomania."

Mortimer on Probate (2nd edition p. 43) states:—

> "Medical jurists have commonly recognized 4 forms which insanity may take; mania, monomania, dementia, and idiocy (amentia)."

It is not a case of idiocy, so by a process of elimination I conclude that it was a case of dementia.

On pages 47—48 of Mortimer are described the characteristics of dementia.

In *Austin* v. *Graham*, (1854) 14 E.R. 188 we find the following which appears relevant to a case of dementia:—

> "As the insanity attributed to the deceased was not monomania but a general mental derangement and as the proper mode of testing this allegation was to review the life, habits and opinions of the Testator."

The position then is that following from the Order of Court of 1905 there is a presumption that this Testator was still of unsound mind on 22nd May 1928, the date of the Codicil in dispute. And the question for determination is whether the evidence is sufficient, in view of this, to discharge the burden of proof and establish that the Testator had that degree of soundness of mind which gives testamentary capacity.

The most important evidence is clearly that of the two doctors.

Now, even if these two doctors are to be considered as experts and their evidence valued on that basis, the value of the opinion of an expert, when challenged, as in this case, is dependent upon how his opinion has been formed, what data he had, what examination and investivation he made. The expert cannot be allowed to substitute his bare opinion for what the Court has to find.

It suffices for me to say that I am in complete agreement with the criticisms of the evidence of these witnesses contained in the judgment and with the evaluation thereof by the learned Trial Judge.

I also agree substantially with the views of the learned Judge on the remaining evidence of fact and the other material questions he decided.

I am of opinion, therefore, that this appeal should be dismissed.

The costs of the Respondents, as between Solicitor and client, should be paid out of the estate. The Appellant should bear his own costs.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]
HOWES, Ag. C.J. (F.M.S.) TERRELL, Ag. C.J., (S.S.) & AITKEN, J.

October 1, 1937.

SANTA SINGH vs. PUBLIC PROSECUTOR.

[SELANGOR CRIMINAL APPEAL No. 11 of 1937].

Criminal Law—common intention—direction—sufficiency of—non-direction on certain aspects of evidence—effect of—powers of Court of Criminal Appeal—Penal Code, s. 34.

Where a trial judge in his charge to the assessors directs that, "if two or more persons armed with weapons jointly and in common attack a man, then it matters not which of them strikes the blow. The common intention is to attack the man with weapons. In a case such as that each person, whether it be one or more, is equally guilty in just the same way as if there were only a single assailant."

Held, that such a direction is a correct statement of the law on the subject of common intention.

Rex v. *Vincent Banka*, 5 M.L.J. 66 and *Rex* v. *Chhui Yi*, 5 M.L.J. at p. 180 referred to and applied.

In a proper case the Court of Criminal Appeal has power to allow an appeal, even when the evidence has been fairly and accurately summed up by the trial judge, if the case against the prisoner has not been proved with that certainty which is necessary in order to justify a verdict of guilty. *William Herbert Wallace*, 23 Cr. A. R. 35 referred to.

M. E. A. Farr, for the Appellant.

C. H. Whitton, Deputy Public Prosecutor.

The judgment of the Court (**HOWES, AG. C.J. (F.M.S.), TERRELL, AG. C.J. (S.S.) & AITKEN, J.**) was as follows:—

In this appeal three grounds have been argued; the first being that "the learned Judge was wrong in his direction of the law in the case of murder."

In particular, Mr. Farr, the Advocate assigned to the appellant, argued that the learned Judge was incorrect in his statement of the law as regards 'common intention' which was:—

> "If two or more persons armed with weapons jointly and in common attack a man, then it matters not which of them